Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-788 OF 1996
NH CHAN, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
10 DECEMBER 1999

Land Law *— Sale of land —Termination — Land earlier sold to plaintiffs re-sold to second and third defendants — Whether first agreement terminated upon plaintiffs' failure to pay balance of purchase price — Termination notice did not comply with agreement, whether valid — Whether defendants may enter into second sale and purchase agreement over the same property — Whether knowledge of solicitor preparing second agreement on existence of first agreement may be imputed to defendants — Whether doctrine of bona fide purchasers apply*

By a sale and purchase agreement dated 7 January 1984 ('the first agreement'), the plaintiffs agreed to purchase and the first defendant agreed to sell a shophouse ('the property'). Subsequently on 14 November 1984, the first defendant entered into another sale and purchase agreement ('the second agreement') to sell the property to the second and third defendants. On 1 February 1989, the plaintiffs succeeded in obtaining an order against the first defendant for specific performance of the first agreement. The three defendants did not take any step to set aside the order or appeal against the judgment. On 19 December 1990, the first defendant, which had been wound up at the material time, had effected transfer of the property to the second and third defendants without the knowledge and consent of the official receiver. The plaintiffs then took the present action seeking a declaration that the transfer dated 19 December 1990 to be declared null and void and of no effect and the second and third defendants were to surrender the title of the property to the plaintiffs. Alternatively, the plaintiffs sought an order that the order dated 1 February 1989 to take effect and the official receiver on behalf of the first defendant do execute the memorandum of transfer in favour of the plaintiffs. The first defendant or the official receiver did not file any defence to the plaintiffs' claim. The second and the third defendant in their defence claimed that the first agreement was terminated by the first defendant on 17 July 1984 on the failure of the plaintiffs to pay the balance of the purchase price. The second and third defendants also claimed that they were bona fide purchasers without notice. Judgment was entered against the first defendant and the plaintiffs' claim against the second and third defendants was allowed. The second and third defendants appealed.

Held, dismissing the appeal:

(1) The trial judge was correct in holding that the first agreement was not terminated and was still valid and effective. The first agreement was entered by the first defendant and the plaintiffs. The first defendant failed to challenge the validity of the

agreement and it was not opened to the second and third defendants to challenge its validity since they were not parties to the agreement. Further, the High Court had decided on 1 February 1989 that the plaintiffs were entitled to the specific performance of the first agreement; this clearly indicated that the first agreement was still valid and effective. Though the judgment was served on all three defendants, no appeal or attempt was made by any of the defendants to set aside that judgment (see p 472D–F).

(2) The trial judge was correct in holding that the termination notice dated 17 July 1984 was defective, ineffective and bad in law. The notice did not comply with cl 9(2) of the first agreement. Further, the letter claimed by the defendants to be notice of demand would be bad because the amount demanded was not correct since it was in excess of the amount actually due. Further, contrary to the evidence given in court that the first agreement had been terminated, subsequent correspondence between the parties indicated that the parties had not terminated the first agreement and it was still subsisting (see pp 474C–D, 475A–B, 477B).

(3) In view of the finding that the first agreement was still subsisting, it was unlawful for the first defendant to enter into the second agreement with the second and third defendants in respect of the same property. It was clear that the second agreement was not lawful and should be set aside (see p 477G–H).

(4) The solicitors who was acting for the second and third defendants at the time when the second agreement was prepared admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. It is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except where the solicitor acted fraudulently. Since the solicitor had knowledge of the first agreement, the second and third defendants were deemed to have knowledge of the existence of the first agreement and they were not protected by the doctrine of bona fide purchasers (see pp 477I–478C).

[Bahasa Malaysia summary

Melalui satu perjanjian jual beli bertarikh 7 Januari 1984 ('perjanjian pertama'), plaintif-plaintif telah bersetuju untuk membeli dan defendan pertama telah bersetuju untuk menjual satu rumah kedai ('harta tersebut'). Selepas itu pada 14 November 1984, defendan pertama telah memasuki satu perjanjian jual beli lain ('perjanjian kedua') untuk menjual harta tersebut kepada defendan-defendan kedua dan ketiga. Pada 1 Februari 1989, plaintif-plaintif berjaya memperoleh satu perintah terhadap defendan pertama untuk pelaksanaan spesifik terhadap perjanjian pertama tersebut. Ketiga-tiga

defendan tidak mengambil apa-apa langkah untuk mengetepikan perintah itu atau membuat rayuan terhadap penghakiman tersebut. Pada 19 Disember 1990, defendan pertama yang telah digulungkan pada masa matan tersebut, telah mengakibatkan pemindahmilikkan harta tersebut kepada defendan-defendan kedua dan ketiga tanpa pengetahuan dan kebenaran pegawai penerima. Plaintif seterusnya telah mengambil tindakan ini untuk memohon satu deklarasi bahawa pindahmilik bertarikh 19 Disember 1990 diisytiharkan batal dan tak sah dan tiada kesan dan defendan-defendan kedua dan ketiga perlu menyerahkan hakmilik harta tersebut kepada plaintif-plaintif. Sebagai alternatif, plaintif telah memohon satu perintah bahawa perintah bertarikh 1 Februari 1989 dikuatkuasakan dan pegawai penerima bagi pihak defendan pertama melaksanakan satu memorandum pindahmilik yang menyebelahi plaintif-plaintif. Defendan pertama atau pegawai penerima tidak memfailkan apa-apa pembelaan terhadap tuntutan plaintif tersebut. Defendan-defendan kedua dan ketiga di dalam pembelaan mereka mendakwa bahawa perjanjian pertama tersebut telah ditamatkan oleh defendan pertama pada 17 Julai 1984 sebab kegagalan plaintif-plaintif membayar baki harga jualan. Defendan-defendan kedua dan ketiga juga mendakwa bahawa mereka adalah pembeli bona fide tanpa notis. Penghakiman telah dimasuki terhadap defendan pertama dan tuntutan plaintif-plaintif terhadap defendan-defendan kedua dan ketiga telah dibenarkan. Defendan-defendan kedua dan ketiga telah membuat rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Hakim perbicaraan adalah betul apabila memutuskan bahawa perjanjian pertama tidak ditamatkan dan masih sah dan berkuatkuasa. Perjanjian pertama telah dimasuki oleh defendan pertama dan plaintif-plaintif. Defendan pertama telah gagal untuk mencabar kesahihan perjanjian tersebut dan ia tidak terbuka kepada defendan-defendan kedua dan ketiga untuk mencabar kesahihannya memandangkan mereka bukan pihak-pihak kepada perjanjian tersebut. Tambahan pula, Mahkamah Tinggi yang telah memutuskan pada 1 Februari 1989 bahawa plaintif-plaintif berhak mendapat pelaksanaan spesifik terhadap perjanjian pertama dengan jelas menunjukkan bahawa perjanjian pertama tersebut masih sah dan berkuatkuasa. Walaupun penghakiman telah diserahkan ke atas ketiga-tiga defendan, tiada rayuan atau percubaan telah dibuat oleh mana-mana defendan untuk mengetepikan penghakiman tersebut (lihat ms 472D–F).

(2) Hakim perbicaraan adalah betul apabila memutuskan bahawa notis penamatan bertarikh 17 Julai 1984 adalah defektif, tidak berkuat kuasa dan salah di sisi undang-undang. Notis tersebut tidak menurut fasal 9(2) kepada perjanjian pertama tersebut. Tambahan pula, surat yang didakwa oleh defendan-defendan merupakan notis tuntutan adalah salah kerana jumlah yang dituntut adalah tidak betul kerana ia melebihi jumlah yang perlu

dibayar. Tambahan lagi, bertentangan dengan keterangan yang telah diberikan di dalam mahkamah bahawa perjanjain pertama telah ditamatkan, hubungan selanjutnya antara pihak-pihak tersebut menunjukkan bahawa pihak-pihak tersebut tidak menamatkan perjanjain pertma tersebut dan ia masih wujud (lihat ms 474C–D, 475A–B, 477B).

(3) Berdasarkan penemuan bahawa perjanjian pertama tersebut masih wujud adalah tidak sah untuk defendan pertama memasuki perjanjian kedua dengan defendan-defendan kedua dan ketiga berhbung dengan harta yang sama. Adalah jelas bahawa perjanjian kedua tersebut tidak sah dan patut diketepikan (lihat ms 477G–H).

(4) Peguamcara-peguamcara yang bertindak bagi pihak defendan-defendan kedua dan ketiga pada masa perjanjian tersebut disediakan mengakui bahawa beliau mengetahui wujudnya perjanjian jual beli antara defendan pertama dan plaintif-plaintif berhubung dengan harta yang sama. Adalah undang-undang tetap bahawa pengetahuan peguamcara adalah dianggap sebagai undang-undang kerana pengetahuan anakguam kecuali di mana peguamcara telah bertindak secara fraud. Memandangkan peguamcara mempunyai pengetahuan tentang perjanjian pertama tersebut, defendan-defendan kedua dan ketiga sepatutnya mengetahui tentang kewujudan perjanjian pertama tersebut dan mereka tidak dilindungi oleh doktrin pembeli bona fide (lihat ms 477I–478C).]

Notes

For cases on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2833–3271.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors [1995] 2 MLJ 770 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
National Land Code s 340

Harpal Singh Grewal (*Avinder Singh Gill* with him) (*AJ Ariffin, Yeo & Harpal*) for the appellants.

RR Sethu (*GC Ng* and *YS Leong* with him) (*Low Hop Bing, Koh Kong & Associates*) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court): We have dismissed the appeal by the appellants earlier. Now, we give our reasons for doing so.

In this appeal the appellants (the second and third defendants in the court below) appealed against the decision of the High Court, Kuala Lumpur which decided in favour of the respondents (the plaintiffs in the court below). In order to avoid any confusion we will refer to the parties as they were in the court below.

The plaintiffs, by a sale and purchase agreement dated 7 January 1984 ('the first agreement') agreed to purchase and the first defendant agreed to sell a 4-storey shophouse to be built on Lot HS (D) 10748 MLO 6445 Mukim Plentong, Daerah Johor Bahru, Johor ('the said property') at the price of RM300,000. The plaintiffs had paid a total sum of RM160,000 of the purchase price in accordance with the Third Schedule of the agreement. The balance of RM140,000 ('the balance purchase price') were to be paid in stages by the plaintiffs from a housing loan to be obtained by them from a financial institution. By a letter dated 25 August 1984, Bank Bumiputra Malaysia Berhad approved a loan application in the sum of RM140,000 by both plaintiffs. It is to be noted that the loan agreements and the charge instruments had been duly executed by both plaintiffs. By a letter dated 16 November 1984 solicitors for the first defendant, M/s Arthur Lee & Co informed the plaintiffs' solicitors, M/s Abdul Razak Ahmad, that the memorandum of transfer of the said property to the plaintiffs was being prepared. This was in response to two letters dated 6 November 1984 and 14 November 1984 from M/s Abdul Razak Ahmad. Pending the completion of the said transfer, the plaintiffs entered a private caveat on the said property on 7 November 1984. By a letter dated 21 December 1984, M/s Abdul Razak Ahmad provided all the relevant documents pertaining to the transfer to the first defendant with the request that the first defendant do complete and execute the documents and return them forthwith together with the title of the property. The first defendant failed or refused to comply with the said request.

The plaintiffs subsequently came to know that the first defendant had on 14 November 1984 entered into another sale and purchase agreement ('the second agreement') in respect of the said property with the second and third defendants whereby the said property was sold to the second and third defendants. On discovering this, the plaintiffs filed a Writ of Summons dated 24 April 1985 in the High Court at Johor Bahru (Civil Suit No 308–1985) against the first defendant seeking, inter alia, for specific performance of the first agreement. On 17 July 1985, the High Court at Johor Bahru issued an interim order stopping the second and third defendants from taking possession of the said property pending the disposal of Civil Suit No 308–1985. On 1 February 1989, the plaintiffs succeeded in obtaining an order against the first defendant for specific performance of the first agreement. Copies of the interim order and the judgment for specific performance and also the order of the court in respect of this were served on all the three defendants. The three defendants did not take any step to set aside the order or appeal against that judgment.

The new solicitors for the plaintiffs, M/s Low Hop Bing, Koh Kong & Associates, sent the memorandum of transfer coupled with the orders and judgment stated above to the first defendant with the request that the first

A defendant do execute the memorandum of transfer. To date the first defendant had failed to do so. Attempts by the plaintiffs to effect the transfer from the first defendant and the relevant authorities failed. Sometime in August 1989, the plaintiffs discovered that the first defendant had been wound-up by the High Court at Johor Bahru vide Winding-Up Petition No 42–146–1987. The order to wind up the first defendant was dated
B 17 August 1988. The assistant official receiver was informed of the claim by the plaintiffs when copies of the order and judgment were sent to the official receiver. Sometime in January 1991 the plaintiffs discovered that the first defendant had on 19 December 1990 effected transfer of the said property to the second and third defendants by Transfer No 54463/90. The transfer
C was effected as soon as the caveat entered by the plaintiffs expired. All those were done without the knowledge and consent of the official receiver. It was alleged by the plaintiffs that the second and third defendants had conspired with the first defendant to execute the said transfer which was purportedly done pursuant to the second agreement.

D The plaintiffs then took up the present action (Originating Summons No R1–24–05–1991) in court seeking a declaration that the transfer No 54463/90 dated 19 December 1990 to be declared null and void and of no effect. As such the transfer should be set aside and the second and third defendants were to surrender the title of the said property to the plaintiffs. Alternatively, the plaintiffs seek an order that the High Court did order the
E order dated 1 February 1989 made by the High Court, Johor Bahru to take effect and the official receiver on behalf of the first defendant do execute the memorandum of transfer in favour of the plaintiffs or alternatively the senior assistant registrar, High Court to be empowered to execute the transfer. The plaintiffs in the same application undertook to pay the balance of the purchase price amounting to RM140,000 under the first agreement
F to the official receiver. In the same application the plaintiffs also prayed that the court give an order that the second and third defendants deliver vacant possession of the said property to the plaintiffs.

From the record it is clear that the first defendant or the official receiver on his behalf did not file any defence to the plaintiffs' claim. The second and third defendants in their defence denied the plaintiffs' claim and put the
G burden on the plaintiffs to prove the claim. In their defence, the defendants claimed the first agreement was terminated by the first defendant on 17 July 1984, that was on the failure of the plaintiffs to pay the balance of the purchase price. Because of the termination, the second agreement between the first and the second and third defendants is valid and enforceable. It was
H contended by the second and third defendants that the transfer under the second agreement could not be registered because of the private caveat entered by the plaintiffs and on its removal the transfer was effected. The second and third defendants thereby counterclaimed against the plaintiffs for the losses which they had suffered when they were unable to register the transfer because of the caveat.

I The learned trial judge had on 1 October 1996 entered judgment against the first defendant when the first defendant or the official receiver failed to file the statement of defence and not appearing in court on the

hearing date. Subsequently, the official receiver filed an application to set aside the judgment in default but the application was dismissed. The official receiver did not appeal against that decision. The learned judge went on to hear the originating summons against the second and third defendants and at the end of it the plaintiffs' application was allowed and the counterclaim by the second and third defendants was dismissed.

Being dissatisfied with the decision of the learned judge, the second and third defendants appealed to us. Hence the present appeal.

In his judgment, the learned trial judge stated that two issues were raised before him at the trial:

(i) whether the plaintiffs had any interest on the said property in view of the pleading by the second and third defendants that the first defendant had terminated the first agreement before entering into the second agreement; and

(ii) whether the second and third defendants were bona fide purchasers without notice of the plaintiffs' interest.

The learned trial judge decided in favour of the plaintiffs on the first issue when he held that the first agreement was not terminated and is still valid and effective. In his judgment the learned judge stated that the first defendant or the official receiver did not file their statement of defence and as such they failed to challenge the validity of the first agreement. He held that the first agreement was entered by the first defendant and the plaintiffs. The first defendant failed to challenge the validity of that agreement, it was not opened to the second and third defendants to challenge its validity since they were not parties to the agreement. Further, on the evidence adduced before him especially the evidence that the High Court, Johor Bahru in Civil Suit No 308–1985 had decided on 1 February 1989 that the plaintiffs were entitled to specific performance of the first agreement, clearly indicated that the first agreement was still valid and effective. Though the judgment was served on all three defendants, no appeal or attempt was made by any of the defendants to set aside that judgment. In our view it would not be correct for the learned judge in the present action to hold otherwise. To do so would result in two conflicting orders being made. Despite that, the learned judge went on to consider the merits based on the evidence adduced by the parties in particular the evidence of DW1 (Arthur Lee Meng Kwang). This witness was the solicitor for the first defendant at the material times. He gave evidence that on the instruction of the first defendant he sent a letter dated 17 July 1984 stating that the plaintiffs were in arrears in the sum of RM60,000 and interest thereon of the purchase price of the said property. The letter also stated that failure to pay the said sum would render the first agreement to be terminated and invalid. From the evidence, it is not disputed that the letter was sent only to the first plaintiff and not to the second plaintiff. This letter was sent pursuant to cl 9(2) of the first agreement which provides as follows:

> (2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the vendor

A shall give the purchaser or his solicitors not less than fourteen (14) days notice in writing by AR registered post to treat this Agreement as having been repudiated by the purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

B For the sake of completeness the letter dated 17 July 1984 reads as follows:

Date: 17 July 1984

Madam Seek Lai Neo
82, Taman Tiram Baru
C Ulu Tiram
Johor

Dear Madam

Re: Purchase of HS (D) 10748 MLO 6445 Mukim Plentong — Cheng Chuan Dev Sdn Bhd

D The above matter refers.

We are instructed that progressive payments in the sum of $60,000 towards the purchase of the above said property has been due and owing to our clients for more than 28 days of its due date as follows:

E NOTICE DATED	AMOUNT	DUE DATE
31 January 1984	$68,000 being balance payment on reinforced concrete framework, walls, doors & windows frames.	14 February 1984
F 30 April 1984	$30,000 internal and external plastering	14 May 1984
LESS PAYMENT ON 22 May 1984	S38,000	
G BALANCE PAYABLE	$60,000	

Pursuant to cl 8 of your Sale & Purchase Agreement interest is chargeable on delayed progressive payments at the rate of 10% per annum.

We had by an AR registered letter dated 17 July 1984 issued a notice to you requesting payment of the balance of purchase price in the sum of H $98,000. However our clients have upon rechecking their records instructed us that the balance due and owing to date is only in the sum of $60,000 together with interest thereon. As such kindly disregard our earlier letter.

TAKE NOTICE that unless the said sum of $60,000 together with interest thereon at the rate of 10% per annum is paid either directly to our clients or to us as solicitors within 14 days of the date hereof the Sale & I Purchase Agreement shall be treated as repudiated by yourself pursuant to cl 9(2) of the same and be deemed to be annulled without further reference to you.

Yours faithfully
Sgd
cc Cheng Chuan Dev Sdn Bhd

The learned judge found that this letter did not comply with cl 9(2) of the first agreement on the following grounds:

(i) the letter was addressed only to the first plaintiff and not to the second plaintiff; and

(ii) the letter which was sent to the first plaintiff was not sent by AR registered post.

Since that letter was not addressed and sent to the second plaintiff who was a joint purchaser under the first agreement and also the fact that the letter was not sent by AR registered post as required by cl 9(2), the notice of termination purportedly to be in that letter was bad in law. In our view these were findings of facts by the learned judge. As such we are not in a position to disturb those findings. The learned judge then went on to say that since the notice did not comply with cl 9(2) it was bad in law and he went on to hold that the termination notice was defective and ineffective. He held that the first agreement was still valid and effective. We see no reason to disturb the findings of the learned judge. We wish to add further here that the notice of demand referred to in the letter stated above was a notice of demand sent by the same solicitor on the same date to the first plaintiff. That notice of demand was a demand for the sum of RM98,000 which was in excess of the sum indicated in the above letter. It is clear to us that the above-stated letter was sent subsequent to the notice of demand because the notice of demand was referred to in the above-stated letter. The above-stated letter also informed the first plaintiff to ignore the notice of demand issued earlier. For all intents and purposes that notice of demand is deemed to be invalid on the request of the first defendant themselves. That being the case the above-stated letter which was deemed to be a notice of demand by the defendants could not be an effective notice because it was not sent by AR registered post as required by cl 9(2) of the first agreement. The learned judge was right in holding so.

The above-stated letter clearly shows the amount of the progressive payments due from the plaintiffs as of 22 May 1984. From the evidence it is clear that the plaintiffs had made three payments amounting to RM25,000. The payments were made on 1 June 1984, 8 June 1984 and 15 June 1984. These payments were acknowledged by the first defendant with the issuance of temporary receipts. Since the above-stated letter was dated 17 July 1984, it is clear to us that those amounts were not taken into account. Assuming that the letter was a notice of termination it is clear to us the amount due demanded in that letter could not be correct. On the other hand, if the amount due was as on 22 May 1984 as stated in the letter then the acceptance of those payments by the first defendant would act as a waiver. There was no evidence by the first defendant that the payments were not received or the payments received were without prejudice or that those payments were returned. The failure on the part of the first defendant to do so would warrant the above-stated letter as notice of demand being

nullified. Though the first defendant had been precluded from defending, there was nothing to stop the second and third defendants from calling any director or officer of the first defendant to give evidence in court as to this. Failure to do so on the part of the defendants would render the evidence of the plaintiffs to be unchallenged. For that reason the above-stated letter claimed by the defendants to be the notice of demand would be bad because the amount demanded was not correct because it was in excess of the amount actually due.

The next point to consider is, did the first defendant and the plaintiffs accept the fact that there was termination as indicated by the letter dated 17 July 1984 which as alleged by the defendants to be effective fourteen days after the date of that letter? For that purpose we would like to refer to several correspondences between the plaintiffs and the first defendant. The first letter was from M/s Abdul Razak Ahmad to M/s Arthur Lee & Co which reads as follows:

> 6 November 1984
>
> M/s Arthur Lee & Co
> Advocates & Solicitors
> Merlin Tower
> Johor Bahru
>
> Dear Sirs,
>
> *Purchase of HS (D) 10748 MLO 6445 Mk Plentong*
>
> I act for Mdm Seek Lai Neo and Mr Koh Horng Jyh and I am instructed that you act for Cheng Chuan Development Sdn Bhd, the developers.
>
> I am instructed that my clients have entered into an agreement dated 7 January 1984 with your clients for the purchase of the above property.
>
> My clients have to-date paid $160,000 to your clients. My clients have obtained loan facilities in the sum of $140,000 from Bank Bumiputra Malaysia Berhad, Kota Tinggi Branch.
>
> I shall be pleased if you will let me know when is the balance of the purchase price due to your clients.
>
> Yours faithfully,
>
> Sgd
>
> cc Md Seet Lai Neo & Anor

This letter was sent some three months after the purported termination informing the first defendant the plaintiffs had secured a loan from Bank Bumiputra Malaysia Bhd to pay the balance of the purchase price. The letter also requested for the first defendant to inform the plaintiffs of the due date to pay the balance of the purchase price. The reply dated 9 November 1984 reads as follows:

> 9 November 1984
>
> M/s Abdul Razak Ahmad
> Advocate & Solicitor
> 4th Floor, Malayan Banking Building
> Johor Bahru.

Dear Sir,

Re: HS (D) 10748 for MLO 6445, Mukim Plentong

Your letter dated 6 November 1984 refers.

Please be informed that we are acting for both the developer and the purchasers in respect of the sale and purchase of the above property.

As to para 4 of your said letter, we are writing to the developer and shall revert to you in due course.

Yours faithfully,

Sgd

cc Madam Seet Lai Neo & Anor
cc M/s Cheng Chuan Development Sdn Bhd

As can be seen from the reply, as on that date M/s Arthur Lee & Co was still acting for both the first defendant and the plaintiffs. There was no indication whatsoever from M/s Arthur Lee & Co that the first agreement had been terminated. Yet the same person came to court as DW1 and gave evidence that the first agreement had been terminated by the letter dated 17 July 1984. In our view if the first agreement had been effectively terminated he could not have acted for the plaintiffs anymore for they had ceased to be the purchasers. On 14 November 1984, M/s Abdul Razak Ahmad again wrote to M/s Arthur Lee & Co which reads as follows:

Dear Sirs,

Re: HS (D) 10748 MLO 6445 Mukim of Plentong

I refer to your letter dated 9 November 1984 and wish to inform you that I have been instructed by the purchasers to act for them in your stead.

Please let me know whether you have any objections, if not, kindly forward all the relevant documents to me as soon as possible on my undertaking to protect your lien for costs.

The reply to this letter from M/s Arthur Lee & Co was dated 16 November 1984 which reads:

Dear Sir,

Re: HS (D) 10748 for MLO 6445, Mukim Plentong

Your letter dated 14 November 1984 refers.

We write to inform that we have no objections to your acting for the purchasers in our stead.

As we have completed up to the stage of the preparation of the Memorandum of Transfer, please let us have the sum of $905.50 ($857.50 — being equivalent to $^1/_2$ legal costs for preparing the Sale and Purchase Agreement and the Memorandum of Transfer executed by our mutual client, $18 — stamp fee for the Agreement and $30 — trunk calls, miscellaneous & incidentals) less the sum of $200 being our costs and disbursements in respect of the Transfer and a further sum of S330 ($250 — legal costs for preparing the Deed, $40 — stamp fee for Deed and $30 — miscellaneous and incidentals) being our costs and disbursements for the preparation of the Deed.

> Upon receipt of your cheque for the total sum of $1,035.50 we shall forward to you a copy each of the Sale and Purchase Agreement and the Deed together with the duly executed and attested Memorandum of Transfer by the purchasers.

A copy of this letter was sent to the first defendant and also to the plaintiffs. In that letter M/s Arthur Lee & Co informed M/s Abdul Razak Ahmad the amount to be paid by the plaintiffs for the discharge which include preparation of the memorandum of transfer, stamp fee, deed of transfer and other disbursements. This letter also indicated that the transfer instruments had been prepared which in our view is an indication that the parties concerned had not terminated the first agreement and it was still subsisting. Yet DW1 came to court and gave evidence stating that the first agreement had been terminated which contradicted those letters. Sections 91 and 92 of the Evidence Act 1950 are applicable to this piece of evidence.

For the above reasons we agree with the learned trial judge that the first agreement is still valid and the notice of termination dated 17 July 1984 was of no effect.

The learned trial judge then went on to consider the forfeiture by the first defendant of the sum already paid by the plaintiffs for the purchase. In his judgment the learned trial judge referred to cll 9(ii) and 9(iii) of the first agreement. Under those clauses the first defendant is entitled to forfeit only 10% of the total purchase price. The total purchase price of the said property under the first agreement was RM300,000. As such the learned judge found that the first defendant was entitled to the sum of RM30,000 from the total sum paid by the plaintiffs. The balance of the money paid was to be returned to the plaintiffs on the termination of the agreement. There was no dispute that the plaintiffs had paid the sum of RM160,000. It is imperative on the part of the first defendant to refund the sum of RM130,000 when the first defendant terminated the first agreement. Thus, if the first defendant had terminated the first agreement two weeks after 17 July 1984, no refund of the sum of RM130,000 to the plaintiffs was ever made until today. As can be seen the first defendant was wound up only on 17 August 1988 and as such there were no hinderances whatsoever for the first defendant to make the refund from 17 July 1984 to 17 August 1988. We agreed with the learned judge that the irresistible conclusion was that the first agreement was not terminated and if there was termination it was not effective.

In view of the finding that the first agreement was still subsisting it was unlawful for the first defendant to enter into the second agreement with the second and third defendants in respect of the same property. It is clear to us that the second agreement was not lawful and should be set aside.

In the present appeal the second and third defendants pleaded that they were bona fide purchasers without notice and thus protected by s 340 of the National Land Code 1965. The learned judge dealt with this point based on the evidence adduced before him. The learned judge in his judgment stated that the solicitors who was acting for the second and third defendants at the time when the second agreement was prepared, Mr Lim Seng Bok

(DW2), admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. The learned judge went on to say that by reason of the decision of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770, it is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except where the solicitor acted fraudulently. The learned judge found that since the solicitor had knowledge of the first agreement, the second and third defendants were deemed to have knowledge of the existence of the first agreement. It is up to the parties then to make the necessary search and enquiries that the first agreement had been effectively terminated. Otherwise, the learned judge was of the view that the parties were not protected by the doctrine of bona fide purchasers. For that reason the learned judge found that the second and third defendants were not bona fide purchasers without notice. Though the decision of *Aik Ming* had been reversed by the Federal Court, the principle referred to by the learned judge was affirmed.

We have gone through the judgment of the learned trial judge and we could not find any fault or error in the reasoning given by him. We are also satisfied that the learned judge had properly appreciated the evidence adduced. As such we dismissed the appeal with costs. The deposit is to be paid to the respondents towards account of taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar